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Supreme Court of the United States

OCTOBER TERM, 1976

Docket No. 75-1126

TRANS WORLD AIRLINES, INC.,
Petitioner,

against

LARRY G. HARDISON, et al.,
Respondents.

Docket No. 75-1385

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, et al.,
Petitioners,

against

LARRY G. HARDISON, et al.,
Respondents.

MOTION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* AND BRIEF FOR NEW YORK STATE DIVISION OF HUMAN RIGHTS AS *AMICUS CURIAE*

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Motion.

The New York State Division of Human Rights hereby moves this Court to accept for filing the attached proposed *Amicus Curiae* brief.

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Necessity for Motion.

By letter dated December 7, 1976, Stinson, Mag, Thomson, McEvers and Fizzell, Esqs., counsel for petitioner Trans World Airlines, Inc., declined to consent to the filing of an *amicus curiae* brief by the New York State Division of Human Rights.

IN THE

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ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR NEW YORK STATE DIVISION OF HUMAN RIGHTS AS *AMICUS CURIAE*

Interest of the *Amicus Curiae*

The New York State Division of Human Rights is the nation's oldest fair employment practices agency. The Division was created in 1945, in exercise of the state's

police power, for the protection of the public welfare, health and peace of its people, and in fulfillment of the provisions of the Constitution of the State of New York, N.Y. Const. Art. I, § 11, concerning civil rights. 1945 N.Y. Laws, ch. 118. Over the years, the jurisdiction of the Division has been enlarged; its jurisdiction over discrimination specifically based upon the day(s) of one's religious observance derives from legislation which became effective September 1, 1967. 1967 N.Y. Laws, ch. 667; amended September 1, 1971. 1971 N.Y. Laws, ch. 674. The Division's jurisdiction over employment discrimination based upon day(s) of religious observance includes hiring, discharge, and terms, conditions and privileges of employment. N.Y. Executive Law, Art. 15 (Human Rights Law) § 296.1(a) (McKinney).

Under the present New York statute, it is "an unlawful discriminatory practice for any employer to prohibit, prevent or disqualify any person from, or otherwise to discriminate against any person in, obtaining or holding employment, because of his observance of any particular day or days or any portion thereof as a sabbath or other holy day in accordance with the requirements of his religion." *Id.*, § 296.10(a). The 1967 version of this provision proscribed employment discrimination by public employers. This proscription was extended in 1971 to private employers as well.

The major exception and the one pertinent to the instant case, permits a private employer to discriminate against an individual based upon the day(s) of his religious observance "where the uniform application of terms and conditions of attendance to employees is essential to prevent undue economic hardship to the employer." However, as is the case with the other exceptions as well, the employer has the burden of proving his entitlement thereto. *Id.*, § 296.10(c).

The Division's interest in the instant case derives from the substantial similarity of the above statute to the federal provision at issue, 42 U.S.C. §§ 2000e(j), 2000e-2(a)-(d). In both statutes, the same wrong is addressed,* parallel exception is carved out, the burden of proof is on the same party, and a similar result is contemplated.

The Division files this brief to express its interest in a narrow construction of the "undue hardship" exception contained in both statutes. The Division submits that an employer should not be permitted to avoid its duty to accommodate an employee's required days of religious observance by citing as undue hardship a prior seniority system agreement.

In addition, the Division argues in this brief that the court below was correct in its interpretation of the employer's burden of proof. The court properly distinguished the imagined threat of a feared hardship from the proof of an actual one. This accords with the position of the Division in similar cases, that an employer must offer a detailed showing of how much of a burden the accommodation entails.

An affirmance by this Court would provide a consistent interpretation to the federal and state prohibitions against religious discrimination in employment.

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* The federal provision is somewhat broader in coverage, protecting religious practice generally whereas the New York statute's protection is limited to time off for religious observance. However, that difference is not pertinent here, because the case before the Court involves the applicability of the federal provision to time off for religious observance.

ARGUMENT

POINT I

A collective bargaining agreement may not be relied upon as a defense to establish the existence of an undue hardship on the conduct of the employer's business.

Prior to the 1972 amendment of 42 U.S.C. § 2000e, the question whether an employer had a duty to accommodate an employee's religious observance was a matter of statutory construction. *Compare Riley* v. *Bendix,* 464 F.2d 1113 (5th Cir. 1972), *with Kettel* v. *Johnson & Johnson,* 337 F. Supp. 892 (E.D. Ark. 1972). The mandate not to "discriminate", contained in § 2000e-2(a) thru (d), required constant judicial reevaluation of many practices long ingrained in employer-employee relationships. *See, e.g., Griggs* v. *Duke Power Co.,* 401 U.S. 424 (1971). The amendment, however, defined that mandate in regard to religious observance by specifically establishing a duty reasonably to accommodate to an employee's needs until the point of "undue hardship on the conduct of the employer's business". 42 U.S.C. § 2000e(j), Pub. L. 92-261, § 2, Mar. 24, 1972, 86 Stat. 103.

The interpretation of the amendment contended for by appellants would require the Court to find that an employer's duty to accommodate is obviated if it is party to a collective bargaining agreement which arguably prevents such accommodation. Such an interpretation would permit rights established by the statute to be bargained away and, in a circular process of self-serving, would also permit the terms of the collective bargaining agreement to be asserted as creating the "undue hardship" which relieves the employer from the necessity to accommodate. This is clearly contrary to settled principles of Title VII law. *See, e.g.,*

Local 189, United Papermakers and Paperworkers v. *United States,* 416 F.2d 980 (5th Cir. 1969), *cert. den.,* 397 U.S. 919 (1970).

Far from allowing the seniority terms of a collective bargaining agreement to comprise a defense of undue hardship, the thrust of Title VII has been to hold both union and employer responsible for any discrimination resulting from the contract.

> "The rights assured by Title VII are not rights which can be bargained away—either by a union, by an employer, or by both acting in concert. Title VII requires that both union and employer represent and protect the best interests of minority employees . . . [I]f a discriminatory contract provision is acceded to, the bargainee as well as the bargainor will be held liable." *Robinson* v. *Lorillard Corp.,* 444 F.2d 791, 799 (4th Cir. 1971)

Accord, e.g., United States v. *N. L. Industries, Inc.,* 479 F.2d 354 (8th Cir. 1973); *United States* v. *Hayes Int'l Corp.,* 456 F.2d 112 (5th Cir. 1972).

Indeed, the courts have not hesitated to drastically revise discriminatory seniority systems embodied in collective bargaining agreements, *e.g., United States* v. *Bethlehem Steel Corp.,* 446 F.2d 652 (2d Cir. 1971), and to award back pay to class members affected by discriminatory terms of collective bargaining agreements, *e.g., Albemarle Paper Co.* v. *Moody,* 422 U.S. 405 (1975). Additionally, union employees have been held to have "no vested interest in their seniority that precludes the application of laws designed to eradicate . . . discrimination." *Williams* v. *Norfolk and W. Ry. Co.,* 530 F.2d 539, 542 (4th Cir. 1975).

An interpretation permitting an employer to avoid the duty to accommodate by citing as undue hardship a prior collective bargaining agreement is clearly inconsistent with

the purposes of § 2000e(j), which was enacted to overcome the effect of *Dewey* v. *Reynolds Metal,* 429 F.2d 324 (6th Cir. 1970), *aff'd per curiam,* 402 U.S. 689 (1971). See legislative history at 118 Cong. Rec. 705 (1972). Congress could not have been unaware of the bona fide seniority system exception contained in § 2000e-2(h) when it created the undue hardship exception of § 2000e(j). To read the former as governing the latter would render § 2000e(j) a virtual nullity, a result entirely precluded by the basic rule of statutory construction that effect must be given to all parts of a statute where possible. *See, Morton* v. *Mancari,* 417 U.S. 535 (1974); *Abell* v. *United States,* 518 F.2d 1369 (Ct. Cl. 1975); 82 C.J.S. *Statutes* § 346. The later specific enactment contained in § 2000e(j) must be preserved against the earlier general enactment in § 2000e-2(h). *Morton* v. *Mancari, supra.* Both sections are fully effectuated if § 2000e-2(h) is construed as applying only to those bona fide seniority practices which do not prevent the reasonable accommodation to religious observance required by § 2000e(j).

POINT II

To satisfy its burden of proof, an employer must make a detailed showing of the undue burden which the accommodation entails.

Section 2000e(j) requires reasonable accommodation to an employee's religious practice unless the employer can demonstrate that such accommodation would impose undue hardship on the conduct of its business. The cases which have considered this provision have been consistent in requiring the employer to make a detailed showing of a severe and immediate burden.

Thus it has been held that the objections and complaints of employees required to substitute for a Saturday Sabbath observer do not, in and of themselves, constitute un-

due hardship. *Cummins* v. *Parker Seal Co.,* 516 F.2d 544, 550 (6th Cir. 1975).

In *Draper* v. *United States Pipe & Foundry Co.,* 527 F.2d 515 (6th Cir. 1975), the court said:

> "[A]n employer does not sustain his burden of proof merely by showing that an accommodation would be bothersome to administer or disruptive of the operating routine. In addition, we are somewhat skeptical of hypothetical hardships that an employer thinks might be caused by an accommodation that never has been put into practice. The employer is on stronger ground when he has attempted various methods of accommodation and can point to hardships that actually resulted." At 520.

"Undue hardship" is the functional equivalent of "business necessity" as the latter doctrine is applied in Title VII law. "Business necessity" has evolved as a defense to liability for discriminatory practices which are necessary to enable a business to operate safely and efficiently. *Griggs* v. *Duke Power Co.,* 401 U.S. 424 (1971); *Pettway* v. *American Cast Iron Pipe Co.,* 494 F.2d 211, *rehearing denied,* 494 F.2d 1296 (5th Cir. 1974); *United States* v. *Bethlehem Steel Corp.,* 446 F.2d 652 (2nd Cir. 1971). Similarly, § 2000e(j) expressly defines "religion" to permit the existence of discriminatory practices so long as they can be justified on the basis of "undue hardship" on the conduct of the employer's business. As with business necessity, the undue hardship defense is a burden of the employer's proof.

> "The test is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business. Thus, the business purpose must be sufficiently compelling to override any [discriminatory] impact; the challenged practice must effectively carry out the busi-

ness purpose it is alleged to serve; and there must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential [discriminatory] impact." *Robinson* v. *Lorillard Corp.*, 444 F.2d 791, 798 (4th Cir. 1971).

Accord, *Head* v. *Timken Roller Bearing Co.*, 486 F.2d 870 (6th Cir. 1973); *Rowe* v. *General Motors Corp.*, 457 F.2d 348 (5th Cir. 1972).

An employer asserting undue hardship as a defense should be held at least to the same strict standard of proof as if the defense were business necessity. Title VII creates a federal statutory right in an employee to be accommodated in given circumstances according to his religious needs. Even a real and present threat by co-workers to disrupt the employer's operations in order to induce the employer to refuse to recognize that right should not be countenanced as justification for such refusal. Federal rights "are not to be sacrificed or yielded . . . to violence and disorder. . . ." *Cooper* v. *Aaron*, 358 U.S. 1, 16 (1958).

When the threat of co-employee discontent is merely a matter of speculation, as in the instant case, the employer must be held to have failed to carry its burden of proof. *See, Robinson* v. *Lorillard Corp., supra,* at 799 (economic cost of a strike over a discriminatory contract provision is insufficient to constitute business necessity).

Conclusion

This case offers the Court an opportunity to affirm the right of each citizen to obtain and continue employment without fear of discrimination based upon the days of his religious observation. By specifically holding that the

employer's burden of proof is not satisfied by the mere existence of a collective bargaining agreement, but instead requires a detailed showing of the facts which render accommodation an undue hardship, this Court would provide an interpretation establishing consistent employer obligations under both federal and state statutes, and would thereby promote effective enforcement of Title VII rights.

The decision of the Court of Appeals should be affirmed.

Dated: New York, New York, February 14, 1977.

Respectfully submitted,

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